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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 39

JOSE VIRELLA RIVERA, PABLO CANTRES and ANTONIO FALU BENITZ,
Plaintiffs-Respondents

—against—

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
Defendants and Third Party Plaintiffs-Petitioners

—against—

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
Third Party Defendants-Respondents

JOSE VALDIVIA,
Plaintiff-Respondent

—against—

REDERI A/B NORDSTJERNAN and AXEL AXELSON JOHNSON,
Defendants and Third Party Plaintiffs-Petitioners

—against—

INTERNATIONAL SHIPPING AGENCY, INC. and COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK,
Third Party Defendants-Respondents

PETITIONERS' BRIEF IN REPLY

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On the Petition

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PETITIONERS' BRIEF IN REPLY

STATEMENT

Petitioners believe it desirable to submit a short reply to pinpoint the issues in the light of Respondents' brief in opposition.

A comparison of the briefs submitted in support of and in opposition to the Petition reveals:

(1) There is no dispute as to the accuracy of the questions as presented in the Petition.

(2) There are few, if any, fundamental differences as to the material facts.

DISPUTED POINTS

(a) In support of their position that there was no jury issue of contributory negligence, Respondents place great reliance on the language of the Court of Appeals to the effect that on the day of their accident, they complained of working conditions, were assured that remedial action would be taken and were ordered to continue working (Respondents' brief, p. 3). What Respondents apparently fail to acknowledge is that *identical fact patterns* were previously presented to this Court in *District of Columbia* v. *McElligott,* 117 U. S. 621 (1886); *Kane* v. *Northern Central Railway Co.,* 128 U. S. 91 (1888) and *Seaboard Air Line* v. *Horton,* 239 U. S. 595 (1916), and in each the issue of plaintiff's contributory negligence was held to be a question of fact for the jury. Petitioners here seek no more than just that. Certainly the authority of these decisions cannot be ignored by Respondents nor their stature diminished by an off-hand reference to ". . . all the other ancient cases", especially where not one single authority to the contrary has been cited.

(b) The two recent decisions cited by Respondents, *James* v. *Sea Land Service Inc.,* 456 F. 2d 221 (5 Cir., 1972) and *Carey* v. *Lykes Bros. Steamship Company, Inc.,* 455 F. 2d 1192 (5 Cir., 1972) are wholly inapposite. They were concerned solely with the question whether longshoremen overcome by carbon monoxide could be denied *any* recovery on an "operational negligence" defense theory, as explained in *Usner* v. *Lukenback Overseas Corp.,* 400 U. S. 494 (1971). Neither case even mentions the question of contributory negligence.

(c) At page 9 of their brief, Petitioners make the astonishing statement that they stopped working at the time

they complained; resumed work only after being assured that the ship's ventilation system was functioning and had no advance warning after resuming work until they all suddenly collapsed. This simply does not conform to the statement of facts set forth by the Court of Appeals and quoted on page 4 of the Petition and makes no allowance for the additional testimony quoted verbatim in Petitioners' appendix.

(d) Respondents attempt to side-step Petitioners' contention that the allowance of $10,000 counsel fees on the basis of the statutory law of Puerto Rico was an unauthorized grafting of a substantive right onto the General Maritime law. Instead of meeting this issue, Respondents cite *Vaughan* v. *Atkinson,* 369 U. S. 527 (1962) in support of a general proposition that counsel fees are recognized in admiralty as equitable relief when appropriate. Petitioners submit that no attempt was made by either of the Courts below or by Respondents to justify the award in this case on the basis of the strict test laid down in *Vaughan* nor do they answer the point raised by the Petition that recoverable damages in an action based on a maritime tort cannot be augmented by local statutes, *Canova* v. *Travelers Insurance Company,* 406 F. 2d 410 (5 Cir., 1969); *Moore-McCormack Lines* v. *Amirault,* 202 F. 2d 893, 897 (1 Cir., 1953).

Respectfully submitted,

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